No. 12-414

In the Supreme Court of the United States

SHERRY BURT, PETITIONER

v.

VONLEE TITLOW

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

To obtain federal habeas relief, Titlow must demonstrate that the Michigan Court of Appeals unreasonably applied this Court's "clearly established" precedent. 28 U.S.C. § 2254(d)(1). This difficult-to-meet standard requires Titlow to show that the Michigan Court of Appeals' ruling rested on "an error well understood and comprehended in existing law[,] beyond *any possibility* for fairminded disagreement." *Metrish* v. *Lancaster*, 133 S. Ct. 1781, 1786–87 (2013) (emphasis added, quotation omitted).

Fairminded jurists could reasonably reach the same conclusion as did the Michigan Court of Appeals, i.e., that attorney Toca was not ineffective for allowing Titlow to maintain innocence. And Titlow identifies no clearly established case law that the Michigan Court of Appeals unreasonably applied.

Instead, Titlow disclaims the factual predicate. For the very first time in this litigation, Titlow asserts that there *was* no claim of innocence. E.g., Resp. Br. 3, 4, 16, 18–23, 31. But Titlow has already admitted that predicate fact. In the district court, Titlow's reply brief began by acknowledging the state court's factual determination: "the second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that [Titlow] did not commit the offense." Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7. Titlow's brief then continued:

> Petitioner [Titlow] does not quibble with this finding. *It is true that a statement of innocence set in motion the second attorney's advice*. [*Id*. (emphasis added).]

Having conceded the predicate fact below, Titlow is forced to argue that everything would have been different if only attorney Toca had reviewed the entire file before advising Titlow to withdraw the plea. But this argument suffers from additional fatal defects: (1) there is not an iota of evidence that attorney Toca even advised Titlow to withdraw the plea, (2) Titlow's first attorney had already gone over all of the evidence with Titlow before Titlow initially made the plea, and (3) there is no amount of "investigation" Toca could have undertaken (in a three-day window, no less) that would have changed Titlow's mind. In sum, the hardest part of this case may be deciding on which ground to reverse the Sixth Circuit's grant of habeas relief.

There are also two important non-AEDPA legal principles at stake. First, the Court should resolve the circuit split regarding how to prove *Strickland* prejudice in the rejected-plea context. A defendant alleging that he would have accepted a plea but for ineffective assistance should be required to produce credible, objective evidence that a defendant would have pleaded guilty but for counsel's bad advice. Pet. Br. 39–43; U.S. Br. 16–21. Titlow has never proffered such evidence. Pet. Br. 42, 43–45; U.S. Br. 21–24.

Second, nothing in this Court's decision in *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), suggests that a state trial court lacks discretion to impose the post-trial sentence, or that the trial court has authority to fashion a new sentence altogether in this context. Pet. Br. 46–51; U.S. Br. 24–32. Yet the Sixth and Ninth Circuits have said precisely those things. For all these reasons, this Court should reverse.

ARGUMENT

I. The Michigan Court of Appeals' decision is entitled to AEDPA deference.

A. Titlow has already conceded that the Michigan Court of Appeals did not unreasonably determine the facts.

If the Michigan Court of Appeals reasonably found that Titlow's "second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that he did not commit the offense," Pet. App. 101a, then there is very little over which to argue under AEDPA. That reality compels Titlow to change course and attack that factual predicate for the very first time in these proceedings. Resp. Br. 3 ("nonexistent claim of innocence"); *id.* at 18 ("Titlow never made any such claim of innocence"); *id.* at 31 ("the State's assertion that Ms. Titlow maintained her innocence is baseless"); accord, e.g., *id.* at 4, 16, 18–19, 20, 21, 22, 23, 31.

Titlow's vehement denials are belied by the briefing in the federal district court below. In answer to Titlow's habeas petition, the State argued that the federal court on habeas review was bound by the state court's factual determination that "the second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that he did not commit the offense." Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7. In response, Titlow said: "Petitioner does not quibble with this finding. It is *true* that a statement of innocence set in motion the second attorney's advice." *Id.* (emphasis added). Having already conceded this point expressly below, Titlow cannot take the opposite position now.

Titlow castigates the State for relying on "a single, out-of-context sentence from a reply brief." Resp. Br. 24. But it is difficult to imagine a more context-specific admission. In the reply brief, Titlow was responding to the State's assertion that the federal habeas court was bound by the Michigan Court of Appeals' fact finding. And Titlow did not "quibble with this finding." Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7.

Titlow impliedly repeated this concession at the certiorari stage. In the petition for certiorari, the State referenced Titlow's claim of innocence several times, e.g., Pet. 2, 10, 18, 24, 28, and Titlow did not object. Under this Court's rules, Titlow was obligated "to point out in the brief in opposition, *and not later*, any perceived misstatement made in the petition." Sup. Ct. R. 15.2 (emphasis added). It is far too late for Titlow to be changing the factual basis on which this case has been litigated.[1]

Far more important, Titlow—like the Sixth Circuit—misapprehends the applicable standard of review in habeas. Under AEDPA, a state-court determination of a factual issue "shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). It is Titlow's burden to rebut this "presumption of correctness by clear and convincing evidence." *Id*. And Titlow cannot satisfy that lofty standard here, wholly aside from this factual concession below.

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1 Although Titlow asserts that the brief in opposition was *pro se*, Resp. Br. 36, n.16, Rule 15.2 does not make that distinction. And while Titlow signed the brief in opposition, Titlow apparently had assistance from counsel, who filed Titlow's certificate of service in this Court.

The Michigan Court of Appeals based its factual finding on William Pierson's affidavit, evidence that *Titlow* submitted in the state-court proceedings. In what can only be called chutzpah, Titlow now chides the state court for relying on that affidavit, which Titlow says is "outside the record." Resp. Br. 19, n.10. But the Michigan Court of Appeals may at any time, in its discretion, "permit . . . additions to the transcript or record" and "draw inferences of fact." Mich. Ct. R. 7.216(A)(4), (6). Having asked the state court to consider and rely on the affidavit, Titlow is hardly in a position to complain after the state court did exactly that.

Moreover, in the lower federal courts, Titlow never challenged the Pierson affidavit's relevance or reliability. Instead, Titlow told the federal district court that "[t]here is nothing in the state court opinion indicating that Attorney Pierson's affidavit was unreliable." Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 8. And it was reasonable for the state court to infer from the affidavit that Titlow was proclaiming innocence; it would make no sense for Deputy Ott to tell Titlow not to plead guilty *unless* Titlow was maintaining innocence.

Of course, the Pierson affidavit was not the only evidence that Titlow was maintaining innocence. Titlow so testified before, during, and after trial:

- On the Chahine wiretap, Titlow said that Billie was "the one that poured the Vodka in [Don's] mouth. She did most everything and she even told me, she said, 'I did all the work'. . . . 'Cause I [Titlow] couldn't do it." [J.A. 18–19];

- When taking the polygraph test, Titlow denied killing Don or planning Don's death [J.A. 38–39];

- At trial, Titlow repeatedly denied any culpability for Don's death [J.A. 257, 259, 261, 268, 270];

- And after the Sixth Circuit remanded this case to allow Titlow to accept the plea deal, Titlow still continued to maintain innocence [J.A. 320–25].

Under AEDPA, the federal courts' inquiry is not whether this evidence adequately supported the state-court factual finding. The test is whether Titlow came forward with "clear and convincing evidence" that rebutted the "presumption of correctness" that attached to the Michigan Court of Appeals' factual finding. 28 U.S.C. § 2254(e)(1). Both Titlow's standard—"plainly contradicted," Resp. Br. 22–23—and the Sixth Circuit's standard—"sufficiently rebut[ted]," Pet. App. 18a—are quite different than AEDPA's "presumption of correctness" standard.

And, like the Sixth Circuit, Titlow offers only one purportedly contradictory fact: that Toca did not mention innocence at the plea-withdrawal hearing and instead focused on the length of the negotiated sentence. Resp. Br. 22–23. But these two motives are hardly mutually exclusive. Toca's hearing comments do not indicate *what* motivated Titlow to withdraw the plea, or whose idea it was to withdraw the plea.

In fact, Titlow and the Sixth Circuit ignore entirely that the Michigan Court of Appeals *also* found that Titlow withdrew the plea "because the agreed upon sentence exceeded the sentencing guidelines range." Pet. App. 100a. Thus, Toca's comments hardly constitute the kind of "clear and convincing evidence" that Congress would have envisioned as sufficient to (1) rebut AEDPA's presumption of correctness, and (2) set aside a jury's state-court murder conviction.

Titlow's only other rebuttal consists of self-serving statements following the conviction. These unsworn, post-conviction statements at sentencing—wrongly referred to by Titlow and the Sixth Circuit panel majority as "testimony," Resp. Br. 41—were not *evidence* of anything other than plea bargainer's remorse. There was no basis to say that Titlow overcame § 2254's presumption of correctness.

In sum, there is nothing in the record—much less "clear and convincing evidence"—that rebuts the "presumption of correctness" AEDPA attaches to the Michigan Court of Appeals' fact findings. And it stands AEDPA on its head for a federal court to grant habeas relief based on a factual theory the habeas petitioner never supported or even preserved in the state court or the federal district court.

Lacking a fact-based avenue for relief, Titlow is left to challenge the Michigan Court of Appeals' legal conclusion, a conclusion that is also cloaked with AEDPA deference. 28 U.S.C. § 2254(d)(1). This is a tall and difficult hurdle, and Titlow does not come close to clearing it.

B. The Michigan Court of Appeals did not unreasonably apply this Court's clearly established precedent.

Titlow does not argue that the Michigan Court of Appeals' decision was "contrary to" this Court's clearly established precedent in *Strickland*. So the only question is whether the state court unreasonably applied that precedent. The Sixth Circuit did not make such a determination, nor could it. That is because Titlow proffered no evidence—as is a habeas petitioner's burden—that Toca even advised Titlow to withdraw the plea, as opposed to following Titlow's directive that the plea be withdrawn.

For example, if Titlow wanted to argue that Toca advised that withdrawing the plea was the best strategic decision, Titlow was required to make that argument in the state-court system by submitting a sworn affidavit. Titlow never did that, presumably because Toca did not give that advice. AEDPA does not authorize the Sixth Circuit to hypothesize about what happened in the state-court proceedings, and yet that is precisely what the Sixth Circuit did.

Titlow also gripes about the "extent" and "depth" of the state-court analysis. Resp. Br. at 26. As a threshold matter, this point is immaterial, because a state court need not give any reasons for its decision. *Harrington* v. *Richter*, 131 S. Ct. 770, 784–785 (2011); *Johnson* v. *Williams*, 133 S. Ct. 1088, 1096 (2013) ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits. . . .").

More important, Titlow's argument improperly shifts the burden of proof to the State and the state-court system. It was (and remains) *Titlow's* burden to identify this Court's clearly established precedent and explain how the Michigan Court of Appeals unreasonably applied that precedent. 28 U.S.C. § 2254(d)(1). It is not the State's burden to *disprove* an unreasonable application of this Court's clearly established precedent.

The Sixth Circuit's upside-down analysis is manifest when that court says that the record in this case "contains no evidence that Toca explained the elements necessary for the government to secure a conviction, discussed the evidence as it bears on those elements, or explained the sentencing exposure the defendant would face as a consequence of exercising each of the options available." Pet. App. 19a (quotation omitted). The proper question is whether the record contains evidence—such as a sworn Titlow affidavit—that Toca did *not* do those things. And the answer is "no." Yet on the basis of that record silence, the Sixth Circuit concluded that "Toca's performance during the plea bargaining stage was clearly deficient." Pet. App. 21a.

Compounding its error, the Sixth Circuit ignored this Court's *Strickland* presumption. Under *Strickland*, a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* v. *Washington*, 466 U.S. 668, 669 (1984). So the Sixth Circuit should have presumed that Toca properly *advised* Titlow about the risks of withdrawing the plea and going to trial.

Instead, the Sixth Circuit presumed the exact opposite: that Toca did not do his job. And it is this presumption of *in*effectiveness that contravenes this Court's clearly established precedent, not any holding of the Michigan Court of Appeals. See *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1403 (2011) (under AEDPA and *Strickland*, a federal habeas court's review of a state court's ineffective-assistance decision is "doubly deferential").

C. Titlow's remaining arguments fail to satisfy AEDPA.

Having cast aside the governing legal standards, Titlow feels free to continue advancing positions that have no factual tether to the record of this case. The thrust of Titlow's argument is that Toca's failure to adequately investigate caused Toca to render "the disastrous advice that Ms. Titlow's Sixth Amendment rights were violated." Resp. Br. 25. Accord *id*. at 26 ("Toca's advice to withdraw Ms. Titlow's plea"); *id*. at 27 ("Toca advised Ms. Titlow to withdraw her plea"); *id*. at 29 (Toca had no "informed reasons for recommending such a reckless gamble"); *id*. at 32 ("Toca's advice to withdraw the plea"). Again, the problem is that there is no record evidence—none—that Toca actually gave that advice or, if he did, in what context he gave it.

Titlow's failure to provide any sworn testimony is fatal. Maybe Toca conveyed to Titlow how strong the prosecutor's case was, maybe not. Under AEDPA, the absence of evidence either way required the Sixth Circuit to reject Titlow's habeas claim. And the lack of sworn testimony is also a basis for rejecting out of hand the saga Titlow's merits brief portrays.

Notably, neither the State nor the Michigan Court of Appeals has endorsed a "categorical" legal standard that relieves an attorney from his duty to investigate before making a plea recommendation. Contra Resp. Br. 32–35. The problem is the lack of evidence that Toca made any recommendation at all. As Sixth Circuit Chief Judge Batchelder explained in her dissent, Titlow "has not presented any evidence indicating that Toca advised [Titlow] to withdraw [Titlow's] plea or that [Toca] was otherwise a decisive factor in [Titlow's] decision to go to trial." Pet. App. 27a (Batchelder, C.J., dissenting).

Even if one improperly assumes that Toca did advise Titlow to withdraw the plea, there is no evidence suggesting that Titlow would have reached a different decision if only Toca had properly investigated in the narrow, three-day window before Titlow had to withdraw the plea. (As noted in the State's principal brief, the record shows that Toca was retained three days—not one week as Titlow claims, Resp. Br. at 28—before Billie's trial was to begin.)

First, Titlow already knew everything Toca could have possibly "investigated." Titlow's first attorney, Lustig, had gone over those exact same facts with Titlow less than one month earlier and advised Titlow about the potential risks of going to trial versus accepting the plea offer. J.A. 43, 44. And Titlow admitted, under oath, to understanding that a jury could find Titlow guilty of murder based on those very facts. J.A. 44.

Second, Toca knew that (1) Titlow was maintaining innocence, (2) Titlow had passed a polygraph, (3) Titlow's minimum sentence under the plea was substantially above the guidelines sentence for a manslaughter charge, (4) the prosecutor publicly said (before the plea withdrawal) that his analysis revealed Titlow was only "guilty of manslaughter," and (5) Titlow's previous attorney had gone over all of the evidence and trial risks with Titlow less than one month earlier. Pet. Br. 35. There is nothing in the record that suggests further investigation would have allowed Toca to change Titlow's mind.

Third, it was not until the trial that Titlow's culpability for murder crystalized. Titlow now says that Lustig's file contained "ample evidence" of Titlow's culpability. Resp. Br. at 30. But earlier in these same proceedings, Titlow argued just the opposite: that the evidence was "by no means overwhelming," that Titlow's comments on the recording with Chahine were "ambiguous," and that "[t]hroughout the tape" Titlow maintained Billie was the murderer, not Titlow. Br. in Support of Pet. for Writ of Habeas Corpus 40, 53.

The most damaging evidence against Titlow was not in attorney Lustig's file at all. It was Chahine's surprise trial testimony and Titlow's disastrous cross-examination performance. Pet. Br. at 38–39. Titlow tells this Court that Chahine's testimony was of no consequence. Resp. Br. at 24. But Titlow told the lower federal courts the opposite—that Chahine's testimony was "the single most damaging piece of evidence" against Titlow; that it moved "Titlow out of the mere-presence-to-smothering column and into

the aiding-and-abetting column of murder;" and that it "was the only evidence offered" on Titlow's "alleged participation in the act of smothering." Br. in Support of Pet. for Writ of Habeas Corpus 27–28, 39; Appellant's Br. on Appeal, 29, 48.

In sum, the Michigan Court of Appeals did not create a hard and fast rule in its unpublished decision; it simply (1) concluded that Titlow failed to satisfy the high burden that *Strickland* imposes on a defendant who seeks to vacate a murder conviction, and (2) recognized a Michigan attorney's ethical obligation when a client maintains innocence. Pet. Br. 31–32. So this case comes down to a critically important but remarkably simple legal principle: the burden of proof in a habeas case under AEDPA.

Applying that burden of proof, Titlow's request for habeas relief fails. Titlow has presented no admissible evidence that (1) Toca advised Titlow to withdraw the plea, (2) Toca's failure to investigate caused that phantom advice, or (3) facts that Toca would have learned during an investigation would have empowered him to change Titlow's mind. Titlow has not produced the "clear and convincing evidence" necessary to rebut the AEDPA "presumption of correctness" that attached to the Michigan Court of Appeals' fact findings, 28 U.S.C. § 2254(e)(1), nor has Titlow demonstrated how the Michigan Court of Appeals unreasonably applied this Court's "clearly established" law. 28 U.S.C. § 2254(d)(1). In other words, Titlow has identified no Michigan Court of Appeals "error well understood and comprehended in existing law[,] beyond any possibility for fairminded disagreement." *Lancaster*, 133 S. Ct. at 1786–87.

II. There is no credible, objective evidence that ineffective assistance caused Titlow to withdraw the plea and go to trial, a necessary prerequisite to a *Lafler* claim.

To demonstrate the "prejudice" prong of a *Strickland* claim in a plea context, "defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1409 (2012). Most federal circuits have required a defendant to satisfy that burden with some corroborating evidence rather than simply post-trial, self-serving assertions like the one Titlow made here. Pet. Br. 41 (numerous citations); U.S. Br. 19–20 (same). At a bare minimum, the defendant's testimony "must [at least] be credible." *Merzbacher* v. *Shearin*, 706 F.3d 356, 366–67 (4th Cir. 2013).

Here, Titlow's only "proof" of prejudice was a self-serving, unsworn plea for leniency at a post-conviction sentencing hearing. Pet. Br. 42–45; U.S. Br. 21–22. As the United States explains, Titlow's statement was not under oath, provided the prosecutor no opportunity for cross-examination, lacked any indicia of reliability, and did not include a state-court credibility finding. In such circumstances, the Sixth Circuit "erred in concluding that the statement by itself was sufficient to establish prejudice." U.S. Br. 22.

Titlow has two responses; neither carries the day. Titlow first argues that the "Sixth Circuit is entirely consistent with all the other circuits in its application of the" prejudice standard. Resp. Br. 37.

But that is the exact opposite of what the Sixth Circuit has said: "Although some circuits have held that a defendant must support his own assertion that he would have accepted the [plea] offer with additional objective evidence, we in this circuit have declined to adopt such a requirement." *Smith* v. *United States*, 348 F.3d 545, 551 (6th Cir. 2003) (quoting *Griffin* v. *United States*, 330 F.3d 733, 737 (6th Cir. 2003)).

Titlow is forced to contradict the Sixth Circuit's view of its own precedent because of the feebleness of his second response—the three pieces of objective, credible "evidence" regarding Titlow's supposed willingness to accept the plea. Resp. Br. 35–37, 39–43. The Court can reject each one in summary fashion:

- First, the fact that Titlow initially accepted but later withdrew a guilty plea cuts against Titlow's position. Resp. Br. 36. Titlow withdrew the plea to maintain innocence. That reality "undermines [Titlow's] claim that the plea would have remained in place but for advice from Toca." U.S. Br. 22.

- Second, Titlow withdrew the plea despite "the strength of the State's evidence." Resp. Br. 36. Earlier in respondent's brief, Titlow argues that "the trial revealed no important facts that had not already been disclosed to the prosecution at the time of the original plea agreement." Resp. Br. 23. Those were the same facts that Titlow's first attorney discussed with Titlow at length. The only thing that changed between that discussion

and the plea withdrawal was Titlow's desire to maintain innocence. As noted above, there is not a shred of evidence that Toca advised Titlow to withdraw the plea.

- Finally, the disparity in sentencing exposure is of no relevance here. Resp. Br. 37. The situation would be different if Titlow's attorney had, as in *Lafler*, misadvised about the conviction and sentencing exposure. But here, Titlow acknowledged on the record the risk of a first-degree murder conviction. J.A. 44. And *Lafler* makes clear that a sentencing disparity is already a separate, independent requirement when proving prejudice. 132 S. Ct. at 1385 (defendant must show a reasonable probability "that the conviction or sentence, or both, under the offer's terms, would have been less severe" than the punishment ultimately faced). This Court should reject Titlow's attempt to use sentencing disparity for double duty.

Two additional factors weigh heavily against Titlow's proffered "evidence." To begin, the probative value of Titlow's statements is questionable because after a defendant has rolled the dice and lost at trial, that defendant has every incentive to recapture the benefit of a lost plea. Pet. Br. at 42; U.S. Br. 18 ("defendants can easily allege, after the fact, that they would have pleaded guilty"). Federal habeas courts should regard with great skepticism a defendant's post hoc, self-serving, post-conviction assertions regarding the acceptance of an earlier plea.

Even more telling, the prosecutor, the trial court, and Titlow's third attorney could barely persuade Titlow to plead guilty even *after* the Sixth Circuit's remand, when the whole point was to reoffer Titlow the opportunity to plead guilty. After the prosecutor re-offered the rejected plea (manslaughter conviction in exchange for Titlow's testimony at Billie's trial), Titlow placed all the blame on aunt Billie, invoked the polygraph-test results, renounced any role in killing Don, and disclaimed even the idea that Billie was trying to kill Don. Pet. Br. 45 (citing J.A. 320, 322, 323, 324). This is hardly the testimony of a defendant who would have accepted a plea but for attorney ineffectiveness.

Titlow gives scant attention to this testimony and instead accuses the State of requesting a "radically new" standard for establishing *Strickland* prejudice in the plea context, one that abolishes any consideration of subjective statements altogether. Resp. Br. 44, 46. But that has never been the State's position. Rather, the State asks simply for the common-sense approach, already adopted in five circuits, that requires some objective, credible evidence to corroborate subjective statements.

The State is also *not* asking the Court to reconsider *Lafler*. Contra Resp. Br. 43. In both *Lafler* and its companion case, *Missouri* v. *Frye*, the defendants presented objective evidence in addition to subjective statements. Pet. Br. at 42; U.S. Br. 20. "Requiring some corroborating evidence ensures that the reviewing court will apply the prejudice prong rigorously." U.S. Br. 21. This Court should adopt that sensible standard.

III. This Court needs to clarify the appropriate remedy for ineffective assistance in rejecting a plea.

In *Lafler* v. *Cooper*, this Court delineated one possible remedy with two potential outcomes where (as here) alleged ineffective assistance caused a defendant to reject a plea offer to a count less serious than the count for which defendant was convicted at trial. 132 S. Ct. at 1389. (The remedy is different where the difference between the plea and the actual sentence is the terms of years rather than the severity of the charge. See Pet. Br. 46.) The possible remedy is to "require the prosecution to reoffer the plea proposal." *Id.* And the outcome depends on how the state trial court exercises its discretion: to "[1] vacate the conviction from trial and accept the plea or [2] leave the conviction undisturbed." 132 S. Ct. at 1389. Accord Pet. Br. 46; U.S. Br. 31–32.

Importantly, the state trial court need not even require the prosecutor to reoffer the plea. The trial court can consider new, post-plea information. *Lafler*, 132 S. Ct. at 1391. The trial court can also take into account refusal to accept responsibility. *Id.* at 1389. And finally, the trial court can consider the reality that requiring the State to reoffer the terms of the plea offer is simply impossible. Here, for example, the State's offer of a less serious count and reduced sentence was contingent on Titlow's testimony against Billie Rogers. Pet. Br. 48–49; U.S. Br. 25–30. Without Titlow's testimony, a jury acquitted Billie, and Billie is now deceased. So the State will *never* have the benefit of its proffered bargain, a fact that the prosecutor emphasized when he reoffered the plea following the Sixth Circuit's decision. J.A. 319.

Titlow lacks any real response to these flaws. So instead, Titlow's overarching argument is that the Sixth Circuit properly applied *Lafler* and "did nothing more than quote [*Lafler*] itself." Resp. Br. 49–50. Not so. First, the Sixth Circuit said that the state trial court could simply "fashion" a new sentence, Pet. App. 25a, one that hews to the plea agreement as a "baseline," *id.*, rather than to Michigan's sentencing guidelines. There is no basis in *Lafler*, Michigan's statutes, or any other source of law for such a proposition in this context.

Second, the Sixth Circuit suggested that the remedy of compelling the State to reoffer the plea would be "illusory" if the state trial court could simply reinstate the post-trial sentence. Pet. App. 25a. Again, there is no precedent that reaches that conclusion, and *Lafler* itself allows a state trial court to leave the conviction and sentence from trial undisturbed. *Lafler*, 131 S. Ct. at 1389, 1391.

Titlow's other Hail Mary pass is procedural, namely, that it is premature for this Court to correct the Sixth Circuit's errors, and there is no confusion about the proper scope of a *Lafler* remedy. Resp. Br. 46–49. Titlow is wrong again.

As a threshold matter, Titlow waived any procedural objections by failing to raise them in the brief opposing Michigan's petition for certiorari. Sup. Ct. R. 15.2; *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2610 (2010). It is inappropriate to assert procedural barriers at the merits stage.

More important, there is undeniably countrywide confusion about appropriate *Lafler* remedies. Consider just a few of the lower-court opinions issued in the short time since this Court decided *Lafler*:

- In a case involving a federal-court conviction, the Sixth Circuit not only ordered the prosecutor to re-offer the rejected plea agreement (or release the defendant from custody), it ordered the district court to *impose* the plea sentence to "remedy" the violation of the defendant's constitutional right. *Jones* v. *United States*, 2012 WL 5382950, at *3 (6th Cir. Nov. 5, 2012).

- In *Ebron* v. *Commissioner of Correction*, 53 A.3d 983 (Conn. Sup. Ct. 2012), the Connecticut Supreme Court said that a proper remedy might include giving the defendant "the opportunity to withdraw his original plea and to be tried." *Id*. *Lafler* does not contemplate a second trial, and such a remedy makes no sense where a defendant also already received a constitutionally adequate trial.

- And in *Johnson* v. *Uribe*, 700 F.3d 413 (9th Cir. 2012), the Ninth Circuit said that the proper remedy for a *Lafler* violation was to allow the defendant to renegotiate the case from the position he would have been in had counsel correctly calculated the lawful maximum sentence. *Johnson*, 700 F.3d at 427. Again, *Lafler* suggests no such thing. The Ninth Circuit denied rehearing en banc over a dissent by the Chief Judge and six

> other judges who described the majority's ruling as a "renegade opinion" showing "a total lack of interest" in what this Court has said about district courts' discretion in fashioning remedies. *Johnson*, 700 F.3d at 418–419.

Finally, Titlow asserts that "[r]elief correcting constitutional deprivations" is not subject to a balancing test. Resp. Br. 52. In other words, if a plea is contingent on a defendant's testimony against a co-defendant and the defendant then refuses to testify (as here), Titlow apparently believes that the Court should ignore that information when considering the appropriate remedy. But *Lafler* suggests imposing a remedy *is* a balancing of competing interests. *Lafler*, 132 S. Ct. at 1388–1389 (Sixth Amendment remedies should be tailored to the injury suffered, while not granting a windfall to the defendant or needlessly squandering the considerable resources the State has invested in the criminal prosecution). And there is nothing unconstitutional about denying a defendant a windfall.

In sum, the implications of the Sixth Circuit's faulty reading of *Lafler* reach far beyond this case. Accordingly, the State respectfully asks that this Court (1) reverse the court of appeals' AEDPA holding, (2) specify that credible, objective evidence is a necessary prerequisite to a defendant's proof that he would have accepted a plea offer but for ineffective assistance, and (3) reaffirm the remedies *Lafler* created for a defendant who proves he would have accepted a plea but for ineffective assistance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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